CLIENT ALERT: Force Majeure? Contractual Performance During the Coronavirus Pandemic

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Do the present circumstances excuse contractual performance? In general, performance will only be excused if: 1) there is a specific provision in the contract excusing performance upon the happening of particular events (a "force majeure" clause); or 2) performance becomes impossible as a result of some circumstance that could not have been foreseen at the time the contract was made.

These concepts are typically narrowly construed by courts; there is a strong preference in the law to enforce contracts. Thus, "force majeure" clauses will be narrowly read to encompass only listed events (and even then, only if the party seeking to be excused could not have prevented the event). And, the "force majeure" event must be the proximate, or direct, cause of the failure to perform.

Force majeure clauses are creatures of contract. There are no "standard" or prescriptive clauses, and such clauses—or any particular types of covered events—are not implied. Each contract must be examined individually to determine whether a force majeure clause exists, and each such clause must be read on its own terms to analyze what types of events are covered. Many force majeure clauses—particularly in construction contracts—will also delineate the obligations of the parties upon the occurrence of a listed event: is performance fully excused, or just suspended? If suspended, which party will bear any associated costs? These questions are answered by reference to the respective contract.

Absent a force majeure clause, a party may be relieved from performance of a contractual obligation through the common law if the obligation becomes impossible to perform, and such impossibility could not have been anticipated in the subject contract. Impossibility means more than just difficulty. Inconvenience, financial loss, required changes to planned operations, etc., will not excuse performance. Rather, the case law indicates that performance must

have been rendered physically impossible, in the truest sense of that word, in order to relieve a non-performing party from liability. Typically, this means that either the means of performance, or the very subject matter of the contract, have been physically destroyed. These rules apply to "acts of God"—typically, the consequences of the "act of God" must have not been avoidable, and the "act of God" must have been directly involved in the destruction of the means of performance or of the subject matter of the contract.

Although sickness can be a basis for the common law defense of impossibility, such an excuse only applies where performance requires the services of a particular individual, who has become ill and thus cannot render the required services.

Governmental action, or changes in law, can also be a basis for a claim of common law impossibility. However, such action or changes still must result in actual impossibility; the fact that a governmental order or change in law makes performance more difficult, inefficient, or economically unprofitable, will generally not relieve a party from performance.

In response to the coronavirus pandemic, governments at various levels have taken some action that may render certain types of performance "impossible," at least for the time being. In particular, government orders prohibiting gatherings of certain sizes may directly render certain contracts impossible to perform. These orders and guidelines are changing daily, and should be routinely monitored to determine whether a claim of impossibility could be successfully asserted. Copies of Governor Cuomo's applicable Executive Orders can be found here.

Please contact Alex Ferrini, or your regular contact at Olshan, if you have any questions.